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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BURL EUGENE CAUSEY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States
Court of Appeals
for the Eleventh Circuit
Case Number 83-8218

BURL EUGENE CAUSEY, JR.,
PRO SE

QUESTIONS PRESENTED FOR REVIEW

Does it affect "interstate commerce," or violate any "federal statute," contained in the Federal Rules of Criminal Procedure, which derived from the, Omnibus Crime Control and Safe Streets Act of 1968, for a citizen from the state of Georgia who is not a convicted felon, to transfer a regulation length shotgun to a citizen who resides in a state other than the state of Georgia, but, who also, is not a convicted felon?

IN SHORT VERSION

Does it violate a federal statute when a non-felon citizen from the state of Georgia transfers a regulation length shotgun to a non-felon citizen from another state?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Captions	vii
Opinion Below	ix
Jurisdiction	ix
Statutory Provisions Involved	x
Statement of the Case	1
Summary	2
Question Presented for Review	3
Reason for Granting the Writ	26
Rules of the Supreme Court	27
Conclusion	27
Certificate of Service	29
Appendix I: Opinion of the Eleventh Circuit	I-1
Appendix II: Opinion of the District Court	II-1
Appendix III: Indictment	III-1

TABLE OF AUTHORITIES

Cases

	Page
Ashton v. Kentucky, 384 U.S. 195, 86 S.Ct. 1407 (1966)	19
Baldwin v. Fish & Game Commission, 436 U.S. 371, 98 S.Ct. 1852 (1978)	8, 13
Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668 (1978)	11
Bouie v. City of Columbia, 378 U.S. 347, 353, 362, 84 S.Ct. 1697 (1964)	18, 20
Chaffin v. Stynchombe, 412 U.S. 17, 32, 33, 93 S.Ct. 1977, n. 20 (1973)	11
Colautti v. Franklin, 439 U.S. 379, 390, 99 S.Ct. 675, 683 (1979)	19, 25
Darnel's Case, 3 Howell's State Trials 1, 45 (1627)	29
Graynard v. City of Rockford, 408 U.S. 104, 108, 109, 92 S.Ct. 2294 (1972)	19
Johnson v. United States, 318 U.S. 189, 197, 63 S.Ct. 549 (1943)	9
Kring v. Missouri, 107 U.S. 221, 235, 2 S.Ct. 443	19
Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939)	8
Lewis v. United States, 445 U.S. 55, 60, 63, 100 S.Ct. 915 (1980)	22
North Carolina v. Pearce, 395 U.S. 711, 738, 89 S.Ct. 2072 (1969)	11

Papachristo v. Jacksonville, 405 U.S. 156, 92 S.Ct. 2294, 2298 (1972) 19, 26

Philbrook v. Glodgett, 421 U.S. 707, 713, 714, 95 S.Ct. 1893 (1975) 23

Pierce v. United States, 314 U.S. 306, 311, 62 S.Ct. 237 24

Raley v. Ohio, 360 U.S. 423, 438, 79 S.Ct. 1257 8

Re Winship, 397 U.S. 358, 380, n. 9, 90 S.Ct. 1068 (1970) 21

Robinson v. California, 379 U.S. 660, 82 S.Ct. 1417 (1962) 18

Tennessee Valley Authority v. Hill, 437 U.S. 153, 185, 195, 98 S.Ct. 2279 (1978) 23

Whalen v. United States, 445 U.S. 684, 689, 100 S.Ct. 1432, n. 9 (1980) 16, 19

United States v. Batchelder, 442 U.S. 114, 123, 99 S.Ct. 2198 (1979) 23

United States v. Campos-Serrano, 404 U.S. 293, 297, 298, 92 S.Ct. 491 (1971) 24

United States v. Cardiff, 344 U.S. 174, 97 L.Ed. 200 (1952) 8

United States v. Davis, 583 F.2d. 190, 194, 195, 198 (5th. Cir., 1978) 8, 24

United States v. Green, 515 F.Supp. 517 (D.C. Md. 1981) 7

United States v. Greer, 588 F.2d 151, 154 (6th Cir., 1978) 7

United States v. Harris, 347 U.S. 612, 74 S.Ct. 808, 811 (1954) 19

United States v. Hudson, 11 U.S. 31, 32-33, 7 Cranch 32, 33-34, 3 L.Ed. 259 (1812) 16, 19

United States v. Mitchell, 557 F.2d. 1290, 1291-92 (9th. Cir., 1977) 9

United States v. Rutherford, 442 U.S. 544, 99 S.Ct. 2470 (1979) 25

United States v. Seven Misc. Firearms, 503 F.Supp. 565, 571 (D.C. Cir., 1978) 7

United States v. Turkette, 452 U.S. 576, 580, 101 S.Ct. 2524 (1981) 23

United States v. Walker, 514 F.Supp. 294 (E.D. La., 1981) 11

United States v. Wiltberger, 18 U.S. 35, 43, 5 Wheat. 76, 95, 5 L.Ed. 37 (1820) 19

Statutes

Page

TITLE IV: Title 18, United States Code, Sections 921 (a)(3)(4)(5), (b)(2)(C) 3, 5, 10, 15, 20

TITLE IV: Title 18, United States Code, Section 922 (a)(5)(A) 3, 10, 15, 20

TITLE VII: Title 18, United States Code, Section 921 (a)(3)(D)(4)(B)(5) 2, 3, 4, 6, 10, 14, 20, 22

TITLE VII: Title 18, United States Code, Section 921 (a)(3) 14

TITLE VII: Title 18, United States Code, Section 922 (a)(5) 2, 4, 5, 20, 23

TITLE VII: Title 18, United States Code, Section 921 (6) 25

TITLE VII: Title 26, United States Code, Sections 5845 (a), (f)(2) 3, 6, 10, 20, 22

TITLE VII: Title 26, United States Code, Section 5861 (d) 8, 21

TITLE VII: Title 18, United States Code, Sections 922 (a)(4), (b)(1) 23
Title 18, U.S.C., Section 922 (a)(3)(C) 21

Miscellaneous

Page

Rules of the Supreme Court: Part V: Jurisdiction on Writ of Certiorari: Rule 17 (1)(a)(c): Considerations Governing Review on Certiorari..... 27
Title 18, United States Code, Rule 35 (a) 1
United States Constitution, Article I; Section 10 24
Note, 1961 Camb. L.J. 144, 146 18
Note, 24 Modern Law Review 626, 631 18
Note, 75 Harvard Law Review 1652, 1654 (1962) 18
Anderson, I Wharton's Criminal Law and Procedure, Sections 19 & 40 (1957)..... 24
Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 University of Pennsylvania Law Review 67 (1960) 19
Goebel; King's Law and Local Customs in Seventeenth Century New England, 31 Colum. L.R. 416, 430, 432, 440 n. 45 (1931) . 18
J. Hall, General Principles of Criminal Law, (2d. ed. 1960) 25
H. Packer, The Limits of the Criminal Sanction, 79-12 (1968) 18

CAPTIONS

	Page
Standard of Review	4
Statutes Involved	4
The Law	5
Overwhelming Evidence of a Non-Existent Offense Charged	7
Judicial Precedent	9
Discriminatory and Selective Prosecution	10
Equal Protection	12
Affect on Interstate Commerce	13
Due Process	14
Separation of Powers Doctrine	15
The Court was Absent Jurisdiction in Count Two	20
Construction of Federal Statutes	22
Judicial Enlargement of a Federal Statute	23
Uniformity of Decisions in the Eleventh Circuit	24
Reasons for Granting the Writ	26
Rules of the Supreme Court	27

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BURL EUGENE CAUSEY, JR.,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eleventh Circuit

The petitioner Burl E. Causey, Jr., respectfully request that a writ of certiorari issue to review the judgment and opinon of . . . the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 19, 1983.

OPINION BELOW

The nine page unpublished opinion of the Eleventh Circuit Court of Appeals, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 19, 1983. A timely petition for rehearing was denied on February 9, 1984, and this petition for certiorari was submitted within 60 days of that date. This Court's jurisdiction is invoked under *Title 28, U.S.C., Section 1254* (1).

QUESTION PRESENTED FOR REVIEW

DOES IT AFFECT "INTERSTATE COMMERCE," OR VIOLATE ANY "FEDERAL STATUTE," CONTAINED IN THE FEDERAL RULES OF CRIMINAL PROCEDURE, WHICH DERIVED FROM THE . . . OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, FOR A CITIZEN FROM THE STATE OF GEORGIA WHO IS NOT A CONVICTED FELON, TO TRANSFER A REGULATION LENGTH SHOTGUN TO A CITIZEN WHO RESIDES IN A STATE OTHER THAN THE STATE OF GEORGIA, BUT . . . . WHO ALSO IS NOT A CONVICTED FELON.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 18, SECTION 922 (a)(5): UNLAWFUL ACTS.

(a) It shall be unlawful—

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe resides in any State other than that in which the transferor resides (or other than that in which its place of business is located . . . if the transferor is a corporation or other business entity); except that this paragraph shall not apply to, (A) the transfer, transportation or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by . . . intestate succession of a firearm by . . . *a person who is permitted to acquire or possess a firearm under the laws of the State of his residence*, and (B) the loan or rental of a firearm to . . . . any person for temporary use for lawful sporting purposes.

UNITED STATES CODE, TITLE 18, SECTION 921 (a)(3)(D)(4)(B)(5); DEFINITIONS.

(a) As used in this chapter—
(3) The term "firearm" means—
(D) any "destructive device"—
(4) The term "destructive device" means—
(B) any type of weapon—(other than a *SHOTGUN* or a shotgun shell which the . . . Secretary finds is generally suitable for sporting purposes).
(5) The term "*SHOTGUN*" means a weapon designed or redesigned, made or remade and intended to be fired from the shoulder and designed, or redesigned and made or remade . . . to use the energy of the explosive in a fixed shotgun shell . . . . to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

STATEMENT OF THE CASE

Petitioner, a qualified, non-felon citizen was arrested September 11, 1979, by A.T.&F. agents for transferring a regulation length shotgun to an out-of-State resident, and subsequently charged in three counts of a MISJOINED indictment with co-defendant, Burl E. Causey, Sr. Petitioner, was acquitted by the jury on Count One. Count Three, was vacated by the District Court in the instant proceedings. Therefore, Count Two, which charged petitioner for transferring a regulation shotgun pursuant to *18, U.S.C., § 922* (a)(5) will be the issue that petitioner contends constituted an illegal sentence.

Petitioner, was indicted September 26, 1978, convicted January 22, 1979, and sentenced February 26, 1979, in the District Court for the Northern District of Georgia to a four year term of imprisonment.

November 23, 1982, petitioner filed a pro se motion to vacate the illegal sentence pursuant to *18, U.S.C., Rule 35* (a); the District Court denied relief in Count Two, but vacated Count Three for being multiplicitous to Count Two.

Petitioner, subsequently filed a timely motion to appeal the judgment of the District Court in regard to the charge in Count Two, and henceforth submitted a timely appeal brief to the Eleventh Circuit Court of Appeals.

However, the appeal was denied by the Eleventh Circuit December 19, 1983, and petitioner immediately filed a timely Petition for Rehearing with Suggestion

for Rehearing En Banc January 5, 1984, but due to a technicality the petition was returned 23 days later. Therefore, the MANDATE was issued January 25, 1984. Petitioner, then submitted a Motion to Recall the Mandate, but however it was denied February 27, 1984. The instant Petition for Writ of Certiorari results therefrom.

SUMMARY OF THE ARGUMENT

THIS CONVICTION WAS NOT SUPPORTED BY CONGRESSIONAL ENACTMENT OR JUDICIAL PRECEDENT

Under the facts involving Count Two there exist no Congressional enactment of judicial precedent that would transmogrify the transfer of a regulation shotgun into an interstate offense in regard to a non-felon citizen. The charge against petitioner is permitted by law; not contrary to law. The transference of a regulation shotgun from one qualified non-felon citizen to another is permissible by law. The authenticity of this fact is acknowledged in the subsectional and subdivisional interacting components provided in *TITLE VII; Public Law 90-618-Oct. 22, 1968 (82 stat.) Section 102; CHAPTER 44; Title 18, U.S.C., Section 921* (a) *as used in this chapter;* (3) *the term "firearm" means;* (D) *any "destructive device";* (4) *the term "destructive device" means;* (B) *any type of weapon OTHER THAN A SHOTGUN.*

Therefore, in accordance to the *definitive statute, Section 921* (a)(3)(D)(4)(B)(5), which defines the function of the Section 922 (a)(5) *penal statute,* the conviction cannot stand. Petitioner was not a convicted

felon; a jurisdictional prerequisite to effect a lawful arrest and conviction for the charge in Count Two. It is not criminal by statutory law to transfer a regulation shotgun *unless* the transferor is a convicted felon. At least four statutes substantiate that regulation shotguns are not firearms for the purpose of prosecuting a qualified non-felon citizen of violating a federal statute by having affect on interstate commerce; to wit:

TITLE VII; Title 18, U.S.C., Section 921 (a)(3)(D)(4)(B)(5);
TITLE VII; Title 26, U.S.C., Sections 5845 (a), (f)(2);
TITLE IV; Title 18, U.S.C., Section 922 (a)(5)(A);
TITLE IV; Title 18, U.S.C., Sections 921 (a)(3)(4)(5), (b)(2)(C).

Respondents are unable to present any statute to prove otherwise, as they cannot provide a federal statute in its entirety to prove that a regulation shotgun is a "firearm" by federal statutory law in regard to a qualified non-felon citizen. Respondent's selection of Section 921 (a)(3) to define Section 922 (a)(5) was unfinished, incomplete and in part only. Thus, petitioner concludes the summary by asserting that the charge in Count Two is without basis nor supported by Congressional enactment or Judicial precedent, for anyone other than Congress is disabled from creating common law crimes by the Separation of Powers Doctrine.

QUESTION PRESENTED FOR REVIEW

DOES IT AFFECT "INTERSTATE COMMERCE," OR VIOLATE ANY "FEDERAL STATUTE," CONTAINED IN THE FEDERAL RULES OF CRIMINAL PROCEDURE WHICH DERIVED FROM THE

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, FOR A CITIZEN FROM THE STATE OF GEORGIA WHO IS NOT A CONVICTED FELON TO TRANSFER A REGULATION LENGTH SHOTGUN TO A CITIZEN WHO RESIDES IN A STATE OTHER THAN THE STATE OF GEORGIA BUT, WHO ALSO IS NOT A CONVICTED FELON.

PROVISIONS OF THE DEFINITIVE STATUTE INVOLVED IN THIS ISSUE:

TITLE VII: PUBLIC LAW 90-618-Oct. 12 (82 STAT) SECTION 102; CHAPTER 44; TITLE 18, UNITED STATES CODE, SECTION 921 (a)(3)(D)(4)(B)(5); FEDERAL RULES OF CRIMINAL PROCEDURE: CHAPTER 44-FIREARMS-DEFINITIONS.

(a) As used in this chapter—
(3) the term "firearm" means—
(D) any "destructive device"—
(4) the term "destructive device" means—
(B) any type of weapon (*other than a "shotgun"* or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known, which will, or which may be readily converted to expel a projectile by the action of an explosive or other propellant and which has a barrel with a bore of more than one-half inch in diameter.
(5) The term "SHOTGUN" means a weapon designed or redisigned, made or remade, and intended to be fired from the shoulder and designed, or redesigned, and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore a number of ball shot or a single projectile for each pull of the trigger.

THE PENAL STATUTE INVOLVED IN THIS ISSUE IS: TITLE 18, UNITED STATES CODE, SECTION 922 (a)(5): —

STANDARD OF REVIEW: The conviction cannot stand because the lower courts failed to comply with

due process, as the conviction was not supported by Congressional enactment or judicial precedent, and constituted an express violation of the Separation of Powers Doctrine, which involved the charging of petitioner with a non-existent federal prohibition.

THE LAW: There are at least four statutes that were enacted in 1968 that are contradictive to the incomplete Section 921 (a)(3) portion of the definitive statute employed by respondents in the unpublished opinion. Petitioner will first illustrate these "four statutes" in the following vertical particulates and immediately thereafter expound on their purpose and function:

TITLE IV; STATE FIREARMS CONTROL ASSISTANCE; FINDINGS AND DECLARATIONS; OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968; PUBLIC LAW 90-351; (82 STAT. 197); Title 18, U.S.C., Section 922 (a)(5); UNLAWFUL ACTS.

(a) It shall be unlawful—
(5) for any person to transfer, sell, trade, give, transport, or deliver to any person (other than a licensed importer, licensed manufacturer, or licensed dealer) who resides in any State other than in which the transferor resides (or, in which his place of business is located if the transferor is a corporation or other business entity)—
(A) *any firearm . . . other than a "SHOTGUN"* or a rifle.

TITLE IV; STATE FIREARMS CONTROL ASSISTANCE; FINDINGS AND DECLARATIONS; CHAPTER 44; FIREARMS; Title 18, U.S.C., Sections 921 (a)(3)(4)(5), (b)(2)(C); DEFINITIONS:—

(a) As used in this chapter—
(3) The term "FIREARM" means any weapon (including a starter gun) which will, or is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any

such weapon; or any firearm muffler, or firearm silencer, or any destructive device.

(4) The term "DESTRUCTIVE DEVICE" means any explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile or similar device; and includes any type of weapon which will or is designed to, or may be readily converted to expel a projectile by the action of any explosive and, having any barrel with a bore of one-half inch or more in diameter.

(5) The term "SHOTGUN" means a weapon designed or redesigned, or made or remade, and intended to be fired from the shoulder, and designed or redesigned, and made or remade, to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each pull of the trigger.

(b) As used in this chapter—

(2) the term "DESTRUCTIVE DEVICE". . . .SHALL NOT INCLUDE—

(C) any "SHOTGUN" other than. . .A SHORT-BARRELED SHOTGUN!

UNITED STATES CODE, TITLE 26, SECTIONS 5845 (a), (f)(2): DEFINITIONS:—

(a) FIREARM.—The term "FIREARM" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches, or a barrel or barrels of less than 18 inches in length.

(f) "DESTRUCTIVE DEVICE"—The term "destructive device" means—

(2) any type of weapon by whatever name known which will, or which may be readily converted to expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter. . .EXCEPT A SHOTGUN. . .or shotgun shell, which the Secretary finds is generally recognized as particularly suitable for sporting purposes.

UNITED STATES CODE, TITLE SECTION 921 (a)(3)(D)(4)(B)(5); DEFINITIONS:

(a) As used in this chapter—

(3) the term "firearm" means—

(D) any "destructive device"—

(4) the term "destructive device" means—

(B) any type of weapon (OTHER THAN A "SHOTGUN" or a shotgun shell which the Secretary finds is generally suitable for sporting purposes) by whatever name known which will, or which may be readily converted to expel a projectile by the action of an explosive or other propellant and, which has any barrel with a bore of more than one-half inch in diameter.

(5) The term shotgun means a weapon designed or redesigned, made or remade and intended to be fired from the shoulder, and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each pull of the trigger.

These "four statutes" are not ambiguous, they are distinct and clear, that it is not prohibited by statute to transfer a regulation shotgun by one qualified non-felon citizen to another, as said shotguns were omitted by Congress from the Firearms Act, and declared exempt from having affect on commerce by the Secretary of the Treasury. This fact is made very clear throughout the Fed. R. Crim. P. in reference to both TITLE IV and TITLE VII, and is especially particularized in Section 921 (a)(3)(D)(4)(B)(5). Thus, in direct contrast to respondents partial and incomplete Section 921 (a)(3) provisions used to deny petitioner's Rule 35 (a), these four aforementioned statutes demonstrate the willingness of Congress to exclude the illegality of regulation shotguns from the Firearms Act, respective of qualified non-felon citizens.[1]

OVERWHELMING EVIDENCE THAT A NON-EXISTENT OFFENSE WAS CHARGED: In view of overwhelming statutory evidence that Section 922 (a)(5) does not compel any boundary lines or area re-

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[1] United States v. Greer, 588 F.2d. 151, 154 (CA6, 1978); United States v. Seven Misc. Firearms, 503 F.Supp. 565, 571 (D.C. Cir., 1978); United States v. Green, 515 F.Supp. 517 (D.C. Md., 1981).

strictions[2] in relationship with the multifaceted functions of the 921 (a)(3)(D)(4)(B)(5) definitive statute in regard to a regulation shotgun the charge in Count Two did not allege a crime, and inasmuch petitioner was convicted for a non-existent federal prohibition. Transference of a sawed-off shotgun that is shorter than the lawfully required dimension without proper registration violates *Title 26, U.S.C., Section 5861* respective of non-felons as well as felons, but the regulation shotgun that provided the basis for the charge in question was not; and was not intended or represented by Congress to be a violation of a statute under the Firearms Act in regard to affect on commerce by a qualified non-felon citizen.[3] Crimes are not to be created by inference. They are not to be constructed nunc pro tunc. As the Supreme Court stated in *Raley v. Ohio*,[4] "We may not convict a citizen for exercising a privilege which the state clearly had told him, was available to him." As the Court emphasized in *Raley*, citing *Lanzetta v. New Jersey*,[5] "Criminal sanctions are not supportable if they are to be imposed under 'vague and undefined' commands"; or if they are inexplicably contradictory; citing *United States v. Cardiff*,[6] and certainly not if the government conduct constitutes "active misleading;" citing *Johnson v. United*

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[2] Baldwin v. Fish & Game Commission, 436 US 371, (1978).

[3] United States v. Davis, 583 F.2d. 190-94-95-98 (CA5, 1978).

[4] Raley v. Ohio, 360 US 423, 438, 79 S.Ct. 1257.

[5] Lanzetta v. New Jersey, 306 US 451, 59 S.Ct. 618 (1939).

[6] United States v. Cardiff, 344 US 174, 73 S.Ct. 189 (1952).

States.[7] Thus, the proof and evidence is overwhelming that petitioner was convicted for a non-existent criminal prohibition.

JUDICIAL PRECEDENT: The instant issue is unprecedented. Though the answer to this identical issue is not to be found in judicial precedent, the solution is easily located in the confluent interaction of the subsectional and subdivisional arrangement designed by Congress and provided in FRCP, Section 921 (a)(3)(D)(4)(B)(5). This unambiguous language when conscientiously construed establishes the correct analysis of the issue in question and according to the precise interpretation thereof, it does not violate a statute if the transference of a regulation shotgun is between two qualified non-felon citizens. Respondents failed to institute the correct interpretive analysis of the functional operation in its entirety as they did not adequately distinguish the constituent criteria of the Section 921 definitive statute's function established by Congress to govern the 922 penal statute, and it is necessary to determine their functions confluently in order to achieve the correct interpretation of the intent of Congress. Respondent's opinion was far put from what Congress intended or enacted in the Firearms Act, as they deviated from the true course in their interpretation and chose *United States v. Mitchell*,[8] to circumvent the issue, but *Mitchell* was a convicted felon regarding his regulation shotgun transaction, and his case is not applicable to the issue in question because petitioner "WAS NOT" a convicted felon. Re-

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[7] Johnson v. United States, 318 US 189, 197, (1943).

[8] United States v. Mitchell, 557 F.2d. 1290 (9th. Cir., 1977).

spondents placed the cart before the horse in their erroneous interpretation to throw the issue out of context from Congressional intent when strictly construed, as petitioner finds it difficult to conceive how they can declare that the "penal statute" governs the "definitive statute." For when you place the horse in front of the cart where it belongs, the definitive statute, 921 (a)(3)(D)(4)(B)(5), governs the 922 (a)(5) penal statute in regard to the issue in question. The Section 922 penal statute's duties are to identify and particularize the persons, time, vicinity and firearm involved in the activity in accordance with the interrelated and confluent interaction of the combination of section, subsections and subdivisional features and functions of the Section 921 definitive statute, which was sanctioned by Congress to govern the operational procedures of Section 922. The bottom line is, 922 does not govern, it charges the offense in question; the Section 921 definitive statute is the governator in accordance with the enactment. At least four statutes substantiate that regulation shotguns are not firearms for the purpose of prosecuting a qualified non-felon citizen of violating a federal statute by affect on commerce; to wit:

TITLE VII: Title 18, U.S.C., Section 921 (a)(3)(D)(4)(B)(5);
TITLE VII: Title 26, U.S.C., Sections 5845 (a), (f)(2);
TITLE IV: Title 18, U.S.C., Section 922 (a)(5)(A); and
TITLE IV: Title 18, U.S.C., Sections 921 (a)(3)(4)(5), (b)(2)(C).

DISCRIMINATORY AND SELECTIVE PROSECUTION: The record substantially proves and concludes that the indictment of petitioner in Count Two

constituted a discriminatory and selective prosecution. The conviction was illigitimate as petitioner was a qualified non-felon citizen who had the inherent right to lawfully transfer a regulation shotgun in accordance with the provisions defined in § 921 (a)(3)(D)(4)(B)(5), whereas under the Due Process Clause, the accused are guaranteed protection from vindictive, selective, and discriminatory prosecutions. The charge against petitioner was not Congressionally enacted, and it is a "basic and fundamental principle of criminal law" that the behavior at issue must exist as proscribed conduct at the time the subject matter occurs.[9] As the Supreme Court stated in *Bordenkicher v. Hayes*,[10] "To punish a person because he has done what the law expressly allows to do. . .is a due process violation of the most basic sort; see, *North Carolina v. Pearce*,[11] and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" See; *Chaffin v. Stynchombe*.[12] Further stated in *North Carolina v. Pearce*, supra, 395 US 739, "due process, moreover, is a guarantee that a man should be tried and convicted only in accordance with *valid* laws of the land." If a conviction is not valid under these laws, statutory and Constitutional, a man has been denied due process and has a Constitutional right to have the conviction set aside without being deprived of life, liberty or property as a result.

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[9] United States v. Walker, 514 F.Supp. 294 (E.D. La. 1981).

[10] Bordenkircher v. Hayes, 434 US 357, 364, (1978).

[11] North Carolina v. Pearce, 395 US 711, 738, (1969).

[12] Chaffin v. Stynchombe, 412 US 17, 32, 33, n. 20 (1973).

EQUAL PROTECTION: Three hundred million to ONE odds. The instant issue is not merely a matter of dissimilar treatment in defining a crime, but was a discriminatory and selective prosecution executed to deprive and prevent petitioner his exercise of the constitutionally protected rights due him. Respondent's illigitimate performance is clearly distinguished and exhibited by the proven fact that since the year 1968, when the Firearms Act was enacted, petitioner was, is, and remains the only qualified non-felon citizen selected from a population consisting of 225 million, plus citizens presently in existence, plus the ones deceased since 1968, that has ever been imprisoned for the transference of a regulation shotgun, an absolute non-existent prohibition. To ascertain the correct analysis of petitioner's issue, the judicator must compare the allegation charged against petitioner, and then include all the interacting provisions and confluent functions designed by Congress in the § 921 definitive statute to govern the § 922 penal statute in comparison to all gun law violations of record, and then evaluate the percentage of "like convictions" (which there is none) with petitioner's conviction, in comparison to the 300 million other citizens, both dead and alive since 1968, who have not confronted the issue in question. . .and you arrive at the astronomical figure of "THREE HUNDRED MILLION, TO '*ONE*' ODDS," of this non-existent prohibition being imposed on another citizen. Petitioner, has persistently demonstrated that the Congressional terminology defining the Firearms Act, and thereby exhibited in the FRCP, interposed with the Secretary of the Treasury's authorization, precludes regulation shotguns from violating a statute by affect on commerce concerning qualified non-felon

citizens. Thus, petitioner has been denied the required equal protection guaranteed to him by the Fourteenth Amendment which extends from the Due Process Clause of the Fifth Amendment. Furthermore, the UNEQUAL protection imposed on petitioner included with the vindictive, selective and discriminatory prosecution subjected petitioner to unconstitutionally unrecoverable differentiated treatment from the other 300 million citizens, which is utmost contrary to the Constitutional standards required by the Equal Protection Clause. Moreover, that petitioner is only ONE from THREE HUNDRED MILLION qualified non-felon citizens to be imprisoned for transference of a regulation shotgun is substantial proof that EQUAL PROTECTION, was, and is, lacking in the instant case. A condition provided for in the Fourteenth Amendment is that "no person, or class of persons, shall be denied the same protection of the law that is enjoyed by other persons or classes of persons under 'like' circumstances."

AFFECT ON INTERSTATE COMMERCE: In *Baldwin v. Fish & Game Commission*,[13] Elk hunters who were "not residents of Montana" brought action in the District Court of Montana seeking relief against that States statutory licensing requirements which they asserted discriminated against non-residents by imposing substantially higher fees than those assessed against residents of Montana. This is a case that demonstrates where residents from other States without affect on Commerce travel interstate to and from Montana with shotguns in order to game-hunt, and

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[13] Baldwin v. Fish & Game Commission, 436 US 371, (1978).

have been doing so year after year without affect on commerce. Note 2, on page 359 specifically states, "We note, in passing, that most States charge non-residents more than residents for hunting licenses." On page 359, it further states "that big-game hunters come from near and far to pursue Elk." Note 9, p. 360 states; "That Montana licensed hunters from each of the other 49 States, the District of Columbia, Puerto Rico and 11 foreign countries in 1974-75." Note 10, on p. 360, states in part; "That the number of non-resident big-game non-resident combination licenses is now restricted to 17,000 in any one license year." It is obvious that the free-trade of regulation shotguns by qualified non-felon citizens was not proscribed by Congress in the Firearms Act, thus persons from Puerto Rico, 11 foreign countries, and three hundred million other American citizens have Constitutional rights, protections, and guarantees that petitioner did not have. . .in contravention of the Equal Protection and Due Process Clauses. The bottom line is; the transference of a regulation shotgun from one qualified non-felon citizen to another is lawful; neither violates a statute nor affects commerce; and until there is a legitimate accusation fairly indicted and fairly tried, Procedural due Process is explicitly denied petitioner.

DUE PROCESS: For the record, petitioner unquestionably was a qualified non-felon citizen with the inherent right to transfer the regulation shotgun in question according to the correct interpretation of § 921 (a)(3)(D)(4)(B)(5), which governs the penal statute, § 922 (a)(5). Prior to the TITLE VII enactment, the preceding TITLE IV enactment authorized § 922 (a)(5)(A) integrated with §§ 921 (a)(3)(4)(5), (b)(2)(C)

to govern the transference of a regulation shotgun from one qualified non-felon citizen to another. Moreover, TITLE IV, § 922 (a)(5)(A) and §§ 921 (a)(3)(4)(5), (b)(2)(C) were not abrogated, they were merely restructured to establish and sanction the definitive statute, § 921 (a)(3)(D)(4)(B)(5) within the TITLE VII enactment. Thus, TITLE VII is merely the revised version of TITLE IV, and therefore § 921 was simply rearranged and enumerated into the proper authoritative sections, subsections and subdivisional sequence to establish the legally correct definition of exactly what type behavior by the different classifications of citizens violates exactly which of the diversified particularities of the various sections, subsections and subdivisional constituents distinguished in the § 922 statute. Thus, if § 922 (a)(5) is strictly construed in accordance with the governing interrelated and confluent interactions of the subsection and subdivisional sequence provided in the § 921 (a)(3)(D)(4)(B)(5) definitive statute, it is not ambiguous; it is distinct, clear, and explicitly detailed for which the Congressionally sanctioned function thereof clearly proves that petitioner was convicted pursuant to a non-existent prohibition; unsanctioned by Congress; and in distinct violation of the Separation of Powers Doctrine.

SEPARATION OF POWERS DOCTRINE: The Separation of Powers Doctrine is a Constitutional mandate that a person *cannot* be criminally punished for conduct that has not been made criminal by an enactment of Congress. "The principle that a person can be found guilty of a crime and punished for his acts only if the Congress beforehand has made the commis-

sion of those acts a crime and has authorized punishment to be imposed upon proof that a person has in fact committed those acts is at the heart of the 'rule of law' characteristic of Anglo-American Juriprudence."[14] In *Whalen v. United States*,[15] the Court reaffirmed the principle first expressed in *United States v. Hudson*,[16] that the Constitutional principle of the Separation of Powers Doctrine forbids a federal court of defining crimes or imposing punishments in the absence of Congressional legislation, and further added that such judicial action would violate the Double Jeopardy Clause as well. Moreover, provided under the Separation of Powers Doctrine, the Congressional Branch of our tripartite type government, rather than the Executive Branch or Judicial Branch, retains the exclusive power to enact laws. Prosecutors clearly are not empowered to enact a statute into law, and therefore are expressly denied the authority to create a criminal offense arising from their personal premise of what the law should, or should not be, or what they presume fits the instant occassion. It is a very simple matter to declare citizens guilty of committing acts and deeds that do not violate a statute as that can very well apply to anyone's personal dislikes, or anything for that matter. Thus federal courts are Constitutionally disallowed jurisdiction of such fictitious, inapplicable and non-existing prohibitions by the Separation of Powers Doctrine, as "no One," has the right to implement indictment of a person for an act that does not comply

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[14] J. Hall, General Principles of Criminal Law 28 (2d.ed. 1960).

[15] Whalen v. United States, 445 US 684, 689, n. 4, (1980).

[16] 11 US 31, 32-33, 7 Cranch 32, 33-34, 3 L.Ed. 259 (1812).

with a statutorial law enacted by Congress. Under our Constitutional principles of law a prosecutor is not empowered to correct immorality or questionable illegality, if said behavior in question is not covered by Congressionally enacted statutes of law. Should Congress have desired that a regulation shotgun transferal involving two qualified non-felon citizens from two different states violate a federal statute, said shotguns would not have been excluded from the enactment and declared exempt by the Secretary of the Treasury, otherwise Congress would have particularized said transaction and prescribed it as a criminal offense which affects commerce; but Congress did not! Respondents, surreptiously by subreption misused § 922 (a)(5) as an all-encompassing common law crime. . .which has been forbidden to the judiciary since the 1812 decision in *United States v. Hudson*, supra, where the Supreme Court held that there "WAS NO JURISDICTION IN FEDERAL COURTS" to try Criminal charges based on the common-law, and that ALL federal crimes must be based on a statute enacted by Congress. There has been no changes in this ancient procedure of law to make special allowances for prosecutors or courts to disregard this fundamental principle of law that was conscientiously and deliberately designed within the Constitution to protect the citizen in his private rights, and guard him against tyranny and arbitrary actions of the government.

Federal Courts have been disabled from creating common-law crimes since the HUDSON case for reasons that closely paralleled the rationales underlying the ex-post-facto clause, the Vagueness Doctrine, as well as the Separation of Powers Principle. Compare

United States v. Whalen, supra, and *United States v. Hudson*, supra, with notes 22 & 23 in *United States v. Walker*, supra, pp. 316, 317. The authority of the Courts to create common law crimes has been challenged on the grounds that judicial exercise of such power is contrary to the rule of law,[17] "is an usurpation of a properly legislative function,"[18] and is objectionable for the same reasons that render unconstitutional an excessively vague statute, and violates the notion of fairness reflected in the constitutional ban on ex-post-facto legislation.[19] There is substantial historical support for the proposition that the colonists were concerned with the imposition of criminal punishments for acts not declared criminal beforehand.[20] The Supreme Court, until now, has never examined this question because federal courts have never had the authority to create common law crimes because of the HUDSON case, and because of the Court's decision in *Bouie v. Columbia*,[21] which essentially forbids this judicial action. . .was handed down only two years after the Court held that the Eighth Amendment was applicable to the States in *Robinson v. California*.[22]

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[17] Note, 1961 Camb. L.J. 144, 146; Note, 24 Modern L. Rev. 626, 631.

[18] Note, 75 Harv. L. Rev. 1652, 1654 (1962) (footnote omitted).

[19] H. Packer, The Limits of the Criminal Sanction 80 (1968).

[20] Goebel; King's Law and Local Customs in Seventeenth Century New England, 32 Columbia L. Rev. 416, 430-32-40, n. 45 (1931).

[21] Bouie v. Columbia, 378 US 347, 358-60, 84 S.Ct. 1697 (1967).

[22] Robinson v. California, 379 US 660, 82 S.Ct. 1417 (1962).

"It is settled that as a matter of due process, a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the 'statute'[23] or is so indefinite that 'it encourages arbitrary and erratic arrest and convictions,'[24] is void for vagueness."[25] This same rule applies to "common law crimes" as statutorily defined offenses.[26] Therefore, it is firmly established that in this Nation, "[N]o one can be criminally punished except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as law at that time."[27] "[W]ithin our Constitutional frame-work the legislative power, including the power to define criminal offenses, and to prescribe the punishments to be imposed upon those found guilty of them, resides with the Congress."[28] The Separation of Powers Doctrine includes the principle that federal courts do not possess the inherent authority to manufacture crimes or criminal punishments.[29] It is the legislature, not the courts, which is to define a crime and ordain its pun-

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[23] United States v. Harris, 347 US 612, 617, (1945).

[24] Papachristo v. Jacksonville, 405 US 156, 162, (1972).

[25] Generally, Note, Graynard v. City of Rockford, 408 US 104, 108-09, 92 S.Ct. 2294, 2298-99 (1972); Colautti v. Franklin, 439 US 379, 390, 99 S.Ct. 675, 683 (1976); Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

[26] Ashton v. Kentucky, 384 US 195, 86 S.Ct. 1407 (1966).

[27] Kring v. Missouri, 107 US 221, 230-31, 2 S.Ct. 443, 451.

[28] Whalen v. United States, supra, 445 US 684, 689 n. 4.

[29] United States v. Wiltberger, 5 Wheat. 76, 95, 5 L.Ed. 37 (1820); United States v. Hudson, supra.

ishments, see; *Bouie v. Columbia*, supra, 378 US 347 at 362, which states as follows:

> "The intention of the legislature is to be collected from the words they employ, and to determine that a case is within the intention of a statute, especially of a penal act, its language must authorize such a determination. The principle that a case which is within the reason or mischief of a statute is within its provisions cannot be carried so far as to punish a crime, not enumerated in a statute because it is of equal atrocity or of kindred character, with those which are enumerated."

Petitioner, by prosecutorial subterfuge, was subreptitiously convicted for what the law clearly permits a qualified non-felon citizen to do, and therefore the conviction of petitioner for transferring a regulation shotgun to an out-of-state-resident did not violate a statute, and thereby constituted an invalid conviction according to *18, U.S.C. § 921* (a)(3)(D)(4)(B)(5) and *26, U.S.C., §§ 5845* (a), (f)(2) of TITLE VII; and *18, U.S.C., § 922* (a)(5)(A) and *18, U.S.C., §§ 921* (a)(3)(4)(5), (b)(2)(C) of TITLE IV, which are accountable and responsible for governing *18, U.S.C., § 922* (a)(5) in compliance with the Congressional enactment of the National Firearms Control Act. It is the Legislative Branch's constitutional responsibility in defining a criminal offense and to affix the scheme of punishment, and this constitutional duty clearly does not devolve upon either the Executive Branch or the Judicial Branch. See; *United States v. Hudson*, supra, and *United States v. Wiltberger*, supra.

THE FEDERAL COURT WAS WITHOUT JURISDICTION IN COUNT TWO: The regulation shotgun in question was transported into Georgia in the 1930's, some 20 years before petitioner was born and 40 years prior to the firearms enactment, and ac-

cording to *18, U.S.C., § 922* (a)(3)(C), there is no interstate nexus to affect commerce concerning the shotgun in question. Thus, the conviction of petitioner for transferring a regulation shotgun to a person who resides in a State other than that of petitioner was invalid and unconstitutional as the interpretation concerning the correlated, reciprocal, interdepending and confluent interacting provisional influences constructed by Congress to provide the definitive statute, § 921 (a)(3)(D)(4)(B)(5) the authoritative function to govern the § 922 (a)(5) penal statute, was misconstrued by respondents pertaining to the section, subsection, and subdivisional provisions enumerated by Congress and illustrated in the following FRCP particulate; § 921 (a) *As used in this chapter*; (3) *the term "firearm" means*; (D) *any "destructive device"*: (4) *the term "destructive device" means*; (B) *any type of weapon. . .OTHER THAN A SHOTGUN.* Therefore, it is not criminal by a statutory law for one qualified non-felon citizen to transfer a regulation shotgun to another like citizen. The Supreme Court stressed in *Re Winship*,[30] citing, *United States v. Hudson*, supra, in which the Court held. . ."that there was '*no jurisdiction*' in federal courts to try criminal charges based on the common law, and that ALL federal crimes must be based on a statute of Congress." For the federal courts to have jurisdiction of the subject matter in question, it would be the primary duty of the arresting agents and the prosecutor to prove that the shotgun was illegal in dimension in violation of *26, U.S.C., § 5861* (d); or otherwise prove that petitioner was either a convicted felon or else disqualified for other valid reasons

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[30] Re Winship, 397 US 358, 380, n. 9, 90 S.Ct. 1068 (1970).

which would disallow him to transfer a regulation shotgun under § 922 (a)(5). However, in the case sub judice the government's burden was impossible, as the shotgun was of a legal dimension and petitioner clearly was not a felon. Therefore, pursuant to *18, U.S.C., § 921* (a)(3)(D)(4)(B)(5) and *26, U.S.C., §§ 5845* (a), (f)(2); the two definitive statutes that distinguish shotgun activity, there simply was no interstate nexus affecting commerce and it is clear that the conviction was not supported by Congressional enactment or judicial precedent, and inasmuch the trial court even prior to indictment was indisputably absent of jurisdiction of the allegation charged against petitioner in Count Two.

CONSTRUCTION OF FEDERAL STATUTES: The instant issue is based on the construction of § 922 (a)(5) and its correlation with the governing interaction of § 921 (a)(3)(D)(4)(B)(5), the definitive statute; and when the courts are faced with a problem of statutory construction, the problem must be resolved in the manner the Court admonished in *Lewis v. United States*,[31] which states: "That in any case concerning the interpretation of a statute the starting point must be the language itself." Thus, an accurate analysis of § 922 (a)(5) reveals through the interaction of the governing definitive statute, § 921 (a)(3)(D)(4)(B)(5), that the congressional proscription of a regulation shotgun transferal is directed unambigously at felons, and nothing in the statute even remotely suggest any intent by Congress to preclude the transfer of a regulation shotgun from one qualified non-felon citizen to

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[31] Lewis v. United States, 445 US 55, 60, 63, (1980).

another. Nonetheless, respondents have ignored the clear language employed in the governing § 921, definitive statute, which differentiates in the scope of coverage concerning handguns and other types of firearms in comparison to the scope of coverage designed for regulation shotguns pertaining to qualified non-felon citizens with the obvious distinction being the relative ease with which handguns may be concealed. Petitioner, therefore directs attention to the language employed by the Supreme Court concerning the construction and interpretation of federal statutes in four precedent cases.[32]

JUDICIAL ENLARGEMENT OF A STATUTE: Sufficient statutory basis did not exist to indict petitioner pursuant to § 922 (a)(5) concerning the transfer of a regulation shotgun, for considering the significant factors which militate in favor of "strict construction," § 922 (a)(5) does not provide a basis for the indictment of petitioner, as that statute was not designed to cope with the instant issue, for the shotgun involved was of a legal dimension, and petitioner was not a convicted felon. The function of § 922 (a)(5) is governed by § 921 (a)(3)(D)(4)(B)(5) pursuant to the instant issue, and the interpretation of the interactive operational action of the two statute's association together is not ambiguous. The Supreme Court in *Bouie v. Columbia*, supra, stated as follows:

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[32] United States v. Turkette, 452 US 576, 580 (1981); United States v. Batchelder, 442 US 114, 123, (1979); Philbrook v. Glodgett, 421 US 707, 713, 714, (1975); and Tenn. Valley Authority v. Hill, 437 US 153, 185-95, (1978).

> "As this Court recognized in *Pierce v. United States*,[33] judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." Indeed, an unforseeable judicial enlargement of a criminal statute applied retroactively operates precisely like an ex-post-facto law, such as Article I, Section 10, of the Constitution forbids.

Penal statutes are to be construed strictly; one is not to be subjected to a penalty unless the words of the statute plainly impose it, and when a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate before choosing the harsher alternative. . .to require that Congress should have spoken in a language tht is clear and definite. The Supreme Court of the United States has consistently held that criminal statutes are to be strictly construed, both with respect to the act charged, and the offense and the penalty imposed.[34]

UNIFORMITY OF DECISIONS IN THE ELEVENTH CIRCUIT: Respondents opinion was contradictive and opposite of any and all other opinions derived from "gun" cases determined within their Circuit, or any other Circuit for that matter. In *United States v. Davis*,[35] Davis, like petitioner was not a felon when he transferred a shotgun to another person. Examination of the DAVIS case reveals that even in exporting a shotgun to another country the only prerequisite is that the shotgun be "18" inches or more in

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[33] Pierce v. United States, 314 US 306, 311, 62 S.Ct. 237 (1941).

[34] United States v. Campos-Serrano, 404 US 293, 297-98, 92 S.Ct 491 (1971); Pierce v. United States, supra; Ander, I Wharton's Criminal Law and Procedure, Sections 19 & 40 (1957).

[35] United States v. Davis, 583 F.2d. 190-94-95-98 (CA5, 1978).

length of barrel and "26" inches or more overall. Citing DAVIS at p. 194; the court discussed at length, that one who exports a shotgun has a duty to ascertain whether it is a LEGAL SHOTGUN, i.e., with barrel length over 18 inches, or an ILLEGAL SHOTGUN, with barrel length under 18 inches; at p. 195, the court states: "but only a sawed-off shotgun with a barrel less than 18 inches long is proscribed by the Munitions List;" and at p. 198 the court further stated: "unlike *18, U.S.C., § 921* (6), which defines an offending shotgun by over-all length under 26 inches, the regulation here only affects shotguns with barrel length of less than 18 inches. Count Two charged petitioner with transfer of a regulation shotgun; not an illegal shotgun; and there is no such prohibition enumerated by statute concerning qualified non-felon citizens. The fundamental principle is that the required law must have existed when the conduct in issue occurred.[36] If the legislative purpose is expressed in plain and unambiguous language in a statute, the duty of the courts is to give it effect according to its terms, as courts do not sit as councils of revisicn empowered to rewrite legislation in accord with their own conception of prudent public policy.[37] A statute should be interpreted so as not to render one part inoperative, as a statutory definition which declares what a term means excludes any meaning that is not stated.[38] With respect to criminal statutes and ordinances, all persons are entitled to be in-

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[36] J. Hall, General Principles of Criminal Law (2d.ed. 1960).

[37] United States v. Rutherford, 442 US 379, 393, (1979).

[38] Colautti v. Franklin, 439 US 379, 393, (1979).

formed as to what the state commands or forbids,[39] otherwise, it furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular persons deemed to merit their displeasure, and such a prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest. Petitioner, in effect has been railroaded for a non-existent prohibition, and neither the Eleventh nor the Fifth Circuits have beforehand allowed a conviction concerning the transfer of a regulation shotgun where the transaction involved two qualified non-felon citizens, an ' therefore judgment against petitioner was illegally and unconstitutionally rendered.

REASONS FOR GRANTING THE WRIT

(1) The United States Attorney in collusion with government agents and informers subreptitiously created a fictitious and non-existent unprescribed statutorial prohibition by illegally and unconstitutionally fabricating a common law allegation from conduct that both Congress and the Secretary of the Treasury has proclaimed lawful behavior. (2) The conviction of petitioner was not supported by Congressional enactment or judicial precedent. (3) The issue involved concerns the construction of a major federal statute. (4) The due process violation imposed upon petitioner in this case presented a gross miscarriage of justice. (5) The decision of the courts below was grave, unjust, and unreasonable enough to be classified as shockingly wrong. (6) The conceptual importance concerning the public interest in regard to the vital and significant outcome of this case to the general public mandates an authoritative decision by the Supreme Court. (7) The Appellate Court's opinion was not only in direct conflict with all other Circuit Courts, but was in conflict with all other analogous shotgun cases within its very own Circuit. (8) The "Separation of Powers Doctrine" was distinctly violated by government agents and prosecutors, and clearly ignored and disregarded by the lower courts. (9) The Writ should be granted to

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[39] Papachristo v. Jacksonville, supra, 405 US 156, (1972).

bring about a uniformity of decisions on the subject matter issue in question.

RULES OF THE SUPREME COURT: PART V; JURISDICTION ON WRIT OF CERTIORARI: RULE 17 (1)(a)(c): CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals; or has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision."
(c) When a federal court of appeals has decided an important question of federal law which has not been . . .but should be. . .settled by this Court, or has decided a general question in a way in conflict with applicable decisions of this court.

CONCLUSION

The question, in a slightly reduced version provides as follows:

- Does it violate a federal statute when a non-felon citizen from the State of Georgia transfers a regulation length shotgun to a non-felon citizen from another State?

The answer by facts and law is: "*it certainly does not.*"

The prosecutor in contravention of the Separation of Powers Doctrine and the Fifth Amendment, Due Process Clause, departed from the intent of a major federal statute pertaining to the, TITLE VII: Omnibus Crime Control and Safe Streets Act of 1968, and furthermore, the MISJOINDER of offenses and defendants created confusion, and a psychological impact on

the jury, that was expressly contributory to the unjustified and unconstitutional conviction of petitioner.

THIS CONVICTION WAS NOT SUPPORTED BY CONGRESSIONAL ENACTMENT OR JUDICIAL PRECEDENT

The government's charge, involved a fraudulent allegation of a fictitious and non-existent federal prohibition, that was in itself a violation of due process as well as the Separation of Powers Doctrine. The charge, as alleged, was a farce. . .and false accusation placed against petitioner which did clearly circumvent a fair trial by imposing confusion upon the jury plus prejudice upon petitioner, that very well denied petitioner the constitutional rights and protections inherently due him as a natural born American citizen.

The trial furthermore, embodied an inflamatory, discriminatory and selective prosecution that embraced a quantum of irregularities, illegalities, and improper actions by federal officials and authorities, in the instant trial, and also thereafter in a State trial.

The "*reasonless charge*" lodged against petitioner in Count Two by agents of the Alcohol-Tobacco-&-Firearms Bureau. . .was improper, illegal, and unconstitutional. . .was not supported by Congressional enactment or judicial precedent. . .and the federal court expressly lacked authoritative jurisdiction to institute trial proceedings of the charge as alleged against petitioner in Count Two.

Ipso jure; ipso facto; by the law itself; by the facts itself; for the justiciable merit of petitioner's cause of action; thereby incorporating any and all. . .of the aforesaid integral particulars, elements, criteria, District, Circuit, and Supreme Court, precedent case laws, interacting with the United States Constitution, and the Federal Rules of Criminal Procedure. . .that are coordinated within this petition; a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

> A Constitution is naught but "empty words" if it cannot be enforced by the courts. It is judicial review that makes constitutional provisions more than mere maxims of political morality. "Addressing the Court" in one of the great State trials of Stuart England, the Attorney General asked, "Shall any say, The King cannot do this? '*No*,' we may only say, '*He*' *will not do this*!" *Darnel's Case, 3 Howell's State Trials 1, 45* (1627). Therefore, it was precisely to ensure that, in the American system of justice. . .one would be able to say, "The government cannot do this!" That the people enacted a written Constitution containing *basic limitations*. . .of what avail would such limitations be, ". . .if there were no legal machinery to enforce them"?

Respectfully submitted,

Burl E. Causey, Jr.

BURL E. CAUSEY, JR.

Pro se

CERTIFICATE OF SERVICE

I, Burl E. Causey, Jr., do hereby certify that on this 15th day of November, 1984, 40 copies of this revised Petition for Writ of Certiorari were mailed to the *Clerk of the United States Supreme Court, Alexander L. Stevas; three copies to Rex E. Lee, Solicitor General of the United States, Room 5614, Department of*

Justice, Washington, D.C., 20530; and to *Larry D. Thompson, United States Attorney, 1800 United States Courthouse, 75 Spring Street, S.W., Atlanta, Georgia, 30303.* I, Burl E. Causey, Jr., do hereby further certify, that all parties required to be served, have been served.

Burl E. Causey, Jr.

BURL E. CAUSEY, JR.

Pro se

Date 11-15-84

Notary Public

RESPONDENT'S ADDRESS IS:

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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-8218
Non Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BURL E. CAUSEY, SR. and BURL E. CAUSEY, JR.,

Defendants-Appellants.

Appeals from the United States District Court
For the Northern District of Georgia

(December 19, 1983)

Before FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

In this appeal Burl Eugene Causey, Sr. and his son, Burl Eugene Causey, Jr., challenge the legality of their sentences for firearms offenses.

On August 11, 1978 Burl Causey, Sr. (Causey), a convicted felon, approached an undercover agent of the Bureau of Alcohol, Tobacco and Firearms and offered to sell him weapons. The agent was posing as the hired killer "Eckerd," whose next plan was to murder the district attorney for Floyd County, Georgia. Needing weapons, he selected Causey's Mauser .380 pistol as adequate to the task. When the pistol failed to fire,

he revised his forecast. Causey replaced the gun with a .38 caliber Smith & Wesson revolver, which proved satisfactory.

The following month, Causey offered to have his son procure two shotguns for use in the murder. The agent, who was amenable to the suggestion, bought the guns from Causey's son (Causey, Jr.) on September 9, 1978.

A federal grand jury subsequently returned a nine-count indictment charging Causey and Causey, Jr. with various firearms offenses. For the August 11 sale of the Smith & Wesson revolver, Causey was charged with and convicted of possession of a firearm by a convicted felon in violation of 18 U.S.C. App. § 1202 (Count 8).[1] Causey was further convicted of transferring the revolver (Count 4) and the Mauser pistol (Count 5) to an out-of-state resident in violation of 18 U.S.C. § 922(a)(5).

The September 8 shotgun sale gave rise to charges against both father and son. They successfully defended charges for possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d) (Count 1). They were convicted, however, of transfer of the shotguns to an out-of-state resident under 18 U.S.C. § 922(a)(5) (Counts 2 and 3). Causey was acquitted of two further counts charging possession of a shotgun in violation of 18 U.S.C. App. § 1202 (Counts 6 and 7).

On direct appeal, we affirmed the convictions. *United States v. Causey*, 609 F.2d 777 (5th Cir. 1980).

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[1] Count 9 involved the same charge. The government dismissed that count before trial.

During the course of that appeal, we also reviewed Causey's conviction on a separate one-count indictment for possession of the Mauser pistol in violation of 18 U.S.C. App. § 1202. We concluded that the one-count indictment warranted dismissal since that indictment, taken together with Count 8 at issue here, charged Causey twice for the single offense of simultaneous possession of two weapons. *Id.* at 778.

This case comes before us for review of the district court's order denying in part the Causeys' motions under Fed. R. Crim. P. 35(a) for reduction of sentence.[2] On review, we may reverse only when the sentence is illegal or when the trial court's refusal to reduce the sentence constitutes a gross abuse of discretion. *United States v. Campbell*, 711 F.2d 159, 160 (11th Cir. 1983) (per curiam).

At the outset Causey claims that his conviction under Count 2 for transfer of a firearm is inconsistent with his acquittal on Counts 1 and 6 for constructive possession of a firearm. He reasons that constructive possession is an element of the offense charged in Count 2. In this circuit, however, inconsistency between verdicts on different counts does not warrant reversal. *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676, 685 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 1017 (1982). Causey's identical argument with

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[2] The district court granted Causey's request to vacate the guilty verdict on Count 3 after the government conceded that the two shotguns involved respectively in Counts 2 and 3 had been transferred simultaneously.

respect to Count 5 and the subsequent one-count indictment fails for the same reason.[3]

Multiplicity is the crux of additional contentions. Causey first argues that his convictions for Counts 4 and 8 subjected him to double jeopardy. Under the standard enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932), the same event properly supports violations of two separate statutory provisions where "each provision requires proof of an additional fact which the other does not." *Id.* at 304. Count 8, involving possession of a firearm, alone required proof of defendant's status as a convicted felon. Count 4 required proof of a firearm transfer to an out-of-state resident, an element absent in the offense charged in Count 8. Since each count entailed a distinct element not common to the other, we conclude that Counts 4 and 8 charged separately punishable offenses.

Causey's multiplicity challenge to Counts 4 and 5 rests on the assertion that the transfer of the Mauser pistol and the Smith & Wesson revolver fall within the simultaneous possession principle of *United States v. Hodges*, 628 F.2d 350 (5th Cir. 1980). The district court concluded that the transfers were sequential rather than simultaneous since Causey supplied the Smith & Wesson only after the Mauser failed to fire.

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[3] The trial court's decision to vacate Causey's conviction for Count 3 renders the same objection to Counts 3 and 7 moot.

Causey also contests his conviction for Counts 2 and 3 on grounds of insufficient evidence. The posture of this case, however, limits our review to correction of an illegal sentence. A Rule 35(a) motion cannot serve as a vehicle to reexamine errors which may have occurred at trial. *Hill v. United States*, 368 U.S. 424, 430 (1962).

We cannot say that the court below erred in distinguishing this case from *Hodges*.[4] By extension, Counts 2, 3,[5] 4 and 5 taken together contain no multiplicity flaw.

Causey, Jr. joins his father's last contention.[6] They argue that their convictions for illegal transfer of legal-length shotguns[7] cannot stand because those weapons do not come within the ambit of the offense charged. The relevant provision, 18 U.S.C. § 922(a)(5), prohibits the unlicensed transfer of firearms to individuals whom the transferor knows or has reason to believe lives out of state. Originally section 922(a)(5) exempted the transfer of shotguns from its proscriptions. Congress eliminated that exemption in 1968, however, and inserted in its place an exemption for the loan, rental, bequest and intestate transfer of firearms

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[4] Causey lodges additional multiplicity challenges to Counts 1, 2 and 6, taken together, as well as to Counts 2 and 3. The double jeopardy clause bars multiple, cumulative sentences for the same transaction unless Congress has clearly manifested the intent to exact multiple penalties. *Albernaz v. United States*, 450 U.S. 333, 343-44 (1981); *Whalen v. United States*, 445 U.S. 684, 692 (1980). Because Causey was acquitted of Counts 1 and 6 and therefore did not suffer multiple penalties, his claim with respect to Count 2 fails for mootness. The challenge to Counts 2 and 3 is similarly flawed since the district court vacated the conviction for Count 3.

[5] As noted above, the district court vacated the conviction on this count.

[6] Causey, Jr. also challenges his conviction on Count 2 because he argues that a nonfelon such as he cannot be convicted of a violation of 18 U.S.C. § 922(a)(5). The subsection does not differentiate between felons and nonfelons, however.

[7] Legal length shotguns are those with barrels eighteen inches or longer. 18 U.S.C. § 921(a)(6).

generally. Pub. L. No. 90-618, § 102, 82 Stat. 1214, 1217-18 (1968), *codified at* 18 U.S.C. § 922(a)(5)(A), (B).

The preceding section, 18 U.S.C. § 921(a)(3), defines the firearms which section 922(a)(5) governs. As a weapon "designed to . . . expel a projectile by the action of an explosive," 18 U.S.C. § 921(a)(3)(A), a shotgun falls within the class of firearms which section 922(a)(5) regulates.

> The fact that Congress distinguished rifles and shotguns from other firearms for purposes of other restrictions elsewhere in the Act, *e.g.*, 18 U.S.C. [§§ 922(a)(4), (b)(1)], demonstrates that . . . Congress, by using the comprehensive term "firearm" without qualification, did not intend to remove rifles and shotguns from the reach of this provision.[8]

United States v. Mitchell, 557 F.2d 1290, 1291-92 (9th Cir. 1977). *See also* H.R. Rep. No. 1577, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 4410, 4413.

In conclusion we discern no basis for reversible error in any of appellants' many contentions. The judgment of the district court is affirmed.

AFFIRMED.

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[8] We further note that the more restrictive definition of "firearm" found at 26 U.S.C. § 5845(a) does not apply to 18 U.S.C. § 922(a)(5).

APPENDIX II

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA

CRIMINAL ACTION

v.

NUMBER CR78-24R

BURL EUGENE CAUSEY, JR.

ORDER

This case is before the Court upon the motion of the defendant, Burl E. Causey, Jr., to correct an illegal sentence pursuant to Rule 35(a) Federal Rules of Criminal Procedure.

Defendant was convicted of Counts Two and Three of Indictment No. CR78-24R charging him with two violations of Title 18, United States Code, Section 922(a)(5). He was sentenced to two concurrent four year terms in the Custody of the Attorney General.

Defendant contends that the weapons described in the indictment do not constitute "firearms" within the terms of the statute. Defendant erroneously relies upon the wording of Title 18, Section 922(a)(5) prior to the 1968 amendment of that statute. At the time the defendant's offenses were committed and at the time he was convicted there was no exemption under the statute for shotguns. The definition of a firearm applicable to Title 18, Section 922(a)(5) is set out in Title 18, Section 921 and includes any weapon which will, or is designed to, or may readily be converted to expel a projectile by the action of an explosive. This definition is broad enough to include the weapons de-

scribed in Counts Two and Three of Indictment CR78-24R.

The defendant's motion to correct sentence is without merit.

ACCORDINGLY, defendant's motion to correct an illegal sentence is DENIED.

IT IS SO ORDERED, this the 3rd day of March, 1983.

/s/ HAROLD S. MURPHY
UNITED STATES DISTRICT JUDGE

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA

CRIMINAL INDICTMENT

v.

NO. 78-24-R

BURL EUGENE CAUSEY and
BURL EUGENE CAUSEY, JR.

COUNT ONE

From on or about September 8, 1978, within the Northern District of Georgia, the defendants, BURL EUGENE CAUSEY and BURL EUGENE CAUSEY, JR. knowingly did possess a firearm, that is, one Eastern Arms Company .12 gauge double barrel shotgun, Serial Number E30383, with a barrel length of less that 18 inches which had not been registered to defendants BURL EUGENE CAUSEY or BURL EUGENE CAUSEY, JR. in the National Firearms Registration and Transfer Record maintained under Section 5841, Title 26, United States Code, said possession being a violation of Section 5861(d), Title 26, United States Code.

COUNT TWO

On or about September 8, 1978, in the Northern District of Georgia, the defendants, BURL EUGENE CAUSEY and BURL EUGENE CAUSEY, JR., being residents of the State of Georgia, knowingly transferred, gave and delivered and caused to be transferred, given and delivered a firearm, that is, one East-

ern Arms Company .12 gauge double barrel shotgun, Serial Number E30383 to a person who the defendants BURL EUGENE CAUSEY and BURL EUGENE CAUSEY, JR. knew and had reasonable cause to believe resided in a state other than the State of Georgia, in violation of Title 18, United States Code, Section 922(a)(5).

COUNT THREE

On or about September 8, 1978, in the Northern District of Georgia, the defendants, BURL EUGENE CAUSEY and BURL EUGENE CAUSEY, JR., being residents of the State of Georgia, knowingly transferred, given and delivered a firearm, that is, a Stephens-Savage Arms double barrel .20 gauge shotgun, model 311, Serial Number B368735, to a person who the defendants BURL EUGENE CAUSEY and BURL EUGENE CAUSEY, JR. knew and had reasonable cause to believe resided in a state other than the State of Georgia, in violation of Title 18, United States Code, Section 922(a)(5).

COUNT FOUR

On or about August 11, 1978, in the Northern District of Georgia, the defendant, BURL EUGENE CAUSEY being a resident of the State of Georgia, knowingly transferred, gave and delivered and caused to be transferred, given and delivered a firearm, that is, a Smith & Wesson .38 caliber revolver, Model 10-5, Serial Number D532209, to a person who the defendant BURL EUGENE CAUSEY knew and had reasonable cause to believe resided in a state other than

the State of Georgia, in violation of Title 18, United States Code, Section 922(a)(5).

COUNT FIVE

On or about August 11, 1978, in the Northern District of Georgia, the defendant BURL EUGENE CAUSEY, being a resident of the State of Georgia, knowingly transferred gave and delivered, and caused to be transferred, given and delivered, a firearm, that is, one Mauser Werke A. G. Oberndorf .380 caliber semi-automatic pistol HSC, serial number 0111743, to a person who the defendant BURL EUGENE CAUSEY knew and had reasonable cause to believe resided in a state other than the State of Georgia, in violation of Title 18, United States Code, Section 922(a)(5).

COUNT SIX

On or about the 8th day of September, 1978, in the Northern District of Georgia, the defendant BURL EUGENE CAUSEY, having been convicted in the Circuit Court of DeKalb County, Alabama, Fort Payne, Alabama on a charge of buying, receiving and concealing stolen property, a felony and a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess a firearm, that is, an Eastern Arms Company .12 gauge double barrel shotgun, serial number E30383, which had been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Appendix, Section 1202.

COUNT SEVEN

On or about the 8th day of September, 1978, in the Northern District of Georgia, the defendant BURL

EUGENE CAUSEY, having been convicted in the Circuit Court of DeKalb County, Alabama, Fort Payne, Alabama on a charge of buying, receiving and concealing stolen property, a felony and a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess a firearm, that is, a Stephens-Savage Arms double barrel .20 gauge shotgun, model 311, serial number B368735, which had been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Appendix, Section 1202.

COUNT EIGHT

On or about August 11, 1978, in the Northern District of Georgia, the defendant BURL EUGENE CAUSEY, having been convicted in a Circuit Court of DeKalb County, Alabama, Fort Payne, Alabama on a charge of buying, receiving and concealing stolen property, a felony and a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess a firearm, that is, one Smith & Wesson .38 caliber revolver, Model 10-5, serial number D532209, which had been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Appendix, Section 1202.

COUNT NINE

On or about August 11, 1978, in the Northern District of Georgia, the defendant BURL EUGENE CAUSEY, having been convicted in a Circuit Court of DeKalb County, Alabama, Fort Payne, Alabama on a charge of buying, receiving and concealing stolen property, a felony and a crime punishable by imprisonment

for a term exceeding one year, did knowingly and unlawfully possess a firearm, that is, one Smith & Wesson .38 caliber revolver, Model 10-5, serial number D532209, which had been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Appendix, Section 1202.

A _____ BILL.

/s/ EDWARD J. HILL
FOREMAN

/s/ WILLIAM L. HARPER
UNITED STATES ATTORNEY

/s/ C. MICHAEL ABBOTT
ASSISTANT UNITED STATES ATTORNEY